

APPEAL NO. 000905

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 30, 2000. The hearing officer determined that the respondent (self-insured) is not relieved from liability under Section 409.002 because of the appellant's (claimant) failure to timely notify the employer pursuant to Section 409.001; that the self-insured did not waive the right to dispute the compensability of the claimed injury, in that the claimant sustained no such injury; that the claimant did not sustain a compensable injury in the form of an occupational disease on or about \_\_\_\_\_; that claimant did not have disability; and that claimant's average weekly wage (AWW) is \$592.40. The claimant appeals, urging that he has bilateral carpal tunnel syndrome (CTS); that the self-insured waived the right to dispute compensability; that he has disability; and that the hearing officer failed to include fringe benefits in his determination of the AWW. The self-insured replies that the hearing officer's decision is supported by sufficient evidence and should be affirmed.

DECISION

Affirmed.

The claimant has attached to his appeal a five-page written statement, asserting facts not in evidence at the CCH. Section 410.203(a)(1) provides that the Appeals Panel shall consider the record developed at the CCH. Consequently, the claimant's assertions not made a part of the record will not be considered on appeal. See Texas Workers' Compensation Commission Appeal No. 92400, decided September 18, 1992.

The claimant worked for the self-insured as a bus driver for approximately eight years. The claimant sustained a compensable injury on \_\_\_\_\_, when he was involved in a motor vehicle accident and sustained injuries to his neck, upper back, lower back, and left shoulder. The claimant received medical treatment with Dr. J, and was off work until certified at maximum medical improvement on November 22, 1999. The claimant testified that he had symptoms of numbness in both hands in November 1998 and this continued after he was off work for the \_\_\_\_\_, injury. According to the claimant, he was told by Dr. J on \_\_\_\_\_, that he had bilateral CTS and that his condition was work related. The claimant asserted disability from November 23, 1999, through December 31, 1999, and from January 15, 2000, through the date of the CCH.

The claimant had an EMG/nerve conduction study performed on \_\_\_\_\_, and Dr. J concluded that it revealed right CTS of moderate severity. However, on August 5, 1999, Dr. J states that the claimant has bilateral CTS, secondary to repetitive use of his hands. The self-insured presented the medical records of Dr. B and Dr. W, who examined the claimant for the \_\_\_\_\_, date of injury, to support its position that the claimant does not have bilateral CTS. On October 9, 1999, Dr. W examined the claimant's upper extremities and found neurological testing normal, with normal sensation bilaterally in his elbows, forearms, wrists, and hands, and normal grip strength.

The claimant had the burden to prove that he sustained an occupational disease, bilateral CTS. The 1989 Act defines injury, in pertinent part, as "damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm." Section 401.011(26). Whether the claimant sustained bilateral CTS was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. There was conflicting evidence presented as to whether the claimant has bilateral CTS. When conflicting medical opinion is presented, it is for the hearing officer to resolve such conflicts. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The hearing officer is the judge of the weight and credibility of the evidence. Section 410.165(a). The hearing officer states that, overall, the credible evidence does not persuasively establish that the claimant sustained a CTS injury. When reviewing a hearing officer's decision, we will reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). After review of the record, we find there was sufficient evidence to support the hearing officer's determination that the claimant does not have bilateral CTS.

The claimant argues that the self-insured waived its right to dispute bilateral CTS and that it has become compensable as a matter of law. The hearing officer found that the dispute was filed by the carrier beyond 60 days after it received written notice of injury, but that there was no waiver because the claimant did not sustain an injury. Under the holding of Continental Casualty Company v. Williamson, 971 S.W.2d 108 (Tex. App.-Tyler 1998, no pet. h.), if an injury does not exist, it cannot be waived into existence by the carrier's failure to timely dispute compensability. Because we affirm the hearing officer's determination that the claimant did not have bilateral CTS, we likewise affirm the determinations that the self-insured did not waive the right to contest compensability of the claimed injury and that the claimant did not sustain a compensable injury in the form of an occupational disease.

The hearing officer determined the claimant's AWW to be \$592.40 based on a fair and just calculation using the claimant's hourly wages and number of hours worked per week. The claimant argued that his AWW should be \$649.42 based on fringe benefits provided by the employer, but did not present any documentation to support his position. The hearing officer found the claimant's evidence insufficient to support the claimant's allegation of the amount of fringe benefits provided. We find the evidence sufficient to support the hearing officer's determination that the claimant's AWW is \$592.40.

The claimant appeals the hearing officer's finding of no disability. Disability is defined as "the inability because of a compensable injury to obtain and retain employment at wages equivalent to the preinjury wage." Section 401.011(16). Since we have found the evidence to be sufficient to sustain the determination of the hearing officer that the claimant did not sustain a compensable injury, the claimant cannot have disability under the 1989 Act. Texas Workers' Compensation Commission Appeal No. 92640, decided January 14, 1993.

The decision and order of the hearing officer are affirmed.

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Dorian E. Ramirez  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Thomas A. Knapp  
Appeals Judge